SUPREME COURT, U.S.

No. 873

Office-Supreme Court, U.S.
FILED
DEC 16 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

On Certiorari to the United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA

—against—

JOSEPH COLOZZO,
Defendant-Appellant.

PETITION FOR CERTIORARI

IRVING YOUNGER
Attorney for Defendant-Appellant
Joseph Colozzo
40 Washington Square South
New York, New York 10003

INDEX

	PAGE
I—Opinion below	1
II—Jurisdiction in this Court	1
III—Questions presented for review	1
IV—Statute involved	2
V—Statement of the case	2
VI—Argument for allowance of the writ	5
Court of Appeals memorandum	1a

TABLE OF CASES AND STATUTES

Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949)	1, 6
International Products Corp. v. *Koons*, 325 F.2d 403 (2d Cir. 1963)	7
Stack v. *Boyle*, 342 U.S. 1 (1951)	6
Title 28, United States Code, section 1291	6

Supreme Court of the United States

On Certiorari to the United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA

—against—

JOSEPH COLOZZO,

Defendant-Appellant.

PETITION FOR CERTIORARI

Joseph Colozzo hereby petitions for writ of certiorari to review an order of the United States Court of Appeals for the Second Circuit.

I

The memorandum of the Court of Appeals is not reported. It is appended hereto.

II

The order sought to be reviewed was entered in the Court of Appeals on October 25, 1966. Jurisdiction to review the order by writ of certiorari is conferred on this Court by Title 28, United States Code, section 1254(1).

III

The questions presented for review are:

(1) Whether the Court of Appeals has jurisdiction, under the doctrine of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S.

541 (1949), to review an order of the District Court denying defendant's motion indefinitely to stay the trial of a criminal case when defendant, in support of his motion, offered the uncontradicted opinion of three physicians either employed by the Government or appointed by the District Court to the effect that if defendant were to undergo a trial it was likely that he would die of a heart attack?

(2) Whether the Court of Appeals, in these circumstances, properly denied defendant's motion for leave to file a petition for a writ of mandamus?

IV

This case involves Title 28, United States Code, section 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

V

On February 2, 1962, the Government filed an information in the United States District Court for the Eastern District of New York, charging Joseph Colozzo (and another not here involved), in three counts, with making false statements on certain labor union reports in violation of Title 29, United States Code, sections 431(a) and 439(b). These crimes are misdemeanors.

From time to time thereafter, the case was called on the trial calendar of the District Court. On each occasion, defendant applied for an adjournment or an indefinite delay of the trial on the ground that his medical condition was too poor to permit him to undergo the rigors of a trial.

Various affidavits and certificates were filed by defendant's personal physicians. Each of them reported, in essence, that defendant's health (and particularly his cardiac condition) made it dangerous for him to undergo a trial.

Of perhaps greater significance is the fact that defendant has several times been examined by physicians appointed by the District Court or employed by the Government.

In October, 1962, the District Court appointed Dr. George H. Roberts to examine defendant (432)*. Dr. Roberts reported to the Court that he had examined defendant, that defendant was suffering from coronary disease, and that he had been so afflicted for the preceding three years. (In short, defendant had been ill for more than two years prior to the filing of the instant information.) Dr. Roberts concluded that defendant was "unable, because of his heart disease, to properly prepare his defense or to participate in it in a trial. His present problem is one of survival in life . . ." (444).

On July 23, 1964, Dr. Roberts made a supplementary report, in which he stated that he had consulted about defendant with a distinguished cardiac specialist and that, if anything, since 1962, defendant's condition had worsened (445-47).

On September 27, 1965, the District Court ordered defendant committed to the United States Public Health Service Hospital on Staten Island for intensive physical examination (436). That institution reported that defendant had been hospitalized, that he was a "class IV cardiac [the most severe classification] with significant disability"

---

* References are to the original record as docketed in the Court of Appeals.

(449), that defendant should "be restricted to sedentary activities only," and that he "cannot prepare a defense and stand trial without danger to his health and life" (452).

On February 19, 1966, the District Court appointed Dr. Abraham G. Cohen to examine defendant. Dr. Cohen reported that he concurred in the diagnosis of the Public Health Service Hospital, and that defendant's "participation in trial proceedings could prove extremely hazardous to his health and life" (458).

On this record — in which the doctors unanimously agreed that a trial would endanger defendant's life, and in which no contrary medical testimony of any kind had been adduced — defendant moved for an adjournment of the trial. The District Court ruled on the motion by making its order of April 18, 1966 (440-78), granting a "tentative adjournment" of the case to October, 1966, on condition that defendant file daily diary reports on forms prescribed by the Court, stating where he went, whom he met, and what he said.

On April 28, 1966, defendant filed a notice of appeal to the Court of Appeals from the order of April 18. The record was docketed in the Court of Appeals on June 30, 1966.

Upon advice of counsel, defendant did not file the diary forms referred to in the District Court's order. However, no sanctions were ever imposed for his failure to do so, and the issue is now plainly moot.*

The case was adjourned on the District Court calendar to October, 1966. On September 12, 1966, defendant moved

---

* Counsel would have argued, *inter alia*, that the District Court's order violated defendant's privilege against self-incrimination and the attorney-client privilege.

for an order indefinitely staying the trial on the ground that his physical condition made it impossible for him to go to trial. His motion was denied on that day.

On September 23, 1966, defendant filed a notice of appeal to the Court of Appeals from the order of September 12.

On September 26, 1966, the Government moved to dismiss both appeals. Defendant opposed the motion and, alternatively, moved for leave to file a petition for a writ of mandamus directing the District Court indefinitely to stay the trial of this case.*

On October 25, 1966, the Court of Appeals filed its memorandum and order dismissing both appeals "on the ground of non-appealability" and denying defendant's motion for leave to file a petition for a writ of mandamus.

It is to review that order that defendant now petitions for a writ of certiorari.

VI

The question of the legality of the District Court's order of April 18, 1966, insofar as it required defendant to keep a daily diary of his activities, is now moot. Apart from that question, however, the two orders appealed from have significance in that they deny defendant's application for an indefinite stay of trial because of his medical condition. The underlying substantive issue, then, is the correctness of the District Court's d termination, on the medical evidence there presented, that trial should not be indefinitely stayed. The procedural issues, in connection with which writ of certiorari is now sought, are whether the Court of Appeals should not have held itself invested with power

---

* Defendant also moved to consolidate both appeals.

to review the District Court's orders, and whether, in these circumstances, the Court of Appeals should not have granted defendant's motion for leave to file a petition for a writ of mandamus.

The appealability of the District Court's orders. It is thrice-familiar federal law that, in general, only final orders are appealable. Title 28, United States Code, section 1291.

It is doubly familiar federal law that there is a "small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). Such orders, though not final, are appealable.

The *Beneficial Loan* doctrine is available in criminal cases. *Stack* v. *Boyle*, 342 U.S. 1, 6 (1951).

If ever there were orders which cried out for review under *Beneficial Loan*, these they are. With a single voice, the doctors say that if defendant is tried, he may die. Suppose the defendant is denied review, and is ordered to trial. Suppose that the doctors' prognostications prove correct, and that he suffers a final heart attack. Would the Court of Appeals then be able to supply a remedy?

In holding the District Court's orders to be non-appealable, the Court of Appeals decided the question of appealability in a way in conflict with applicable decisions of this Court.

The motion for leave to file a petition for a writ of mandamus. The District Court's orders refusing to stay the trial, despite the uncontradicted and overwhelming medical evidence of defendant's disability to go to trial, are

surely a determination so egregiously wrong as to be beyond the District Court's authority. No trial judge can order a man to risk death in order to defend himself against a misdemeanor charge. The Court of Appeals has the power to review such orders by way of extraordinary writ, although it has told the Bar that the better practice is to move, not for issuance of the writ, but for leave to file a petition for the writ. *International Products Corp.* v. *Koons,* 325 F.2d 403 (2d Cir. 1963).

In denying defendant's motion for leave to file a petition for a writ of mandamus, the Court of Appeals sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Dated: New York, New York
November 21, 1966

Respectfully submitted,

IRVING YOUNGER
Attorney for Defendant-Appellant
Joseph Colozzo
40 Washington Square South
New York, New York 10003

Memorandum

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—v—

JOSEPH COLOZZO, et al.,

Appellant.

Before: MOORE, FRIENDLY and KAUFMAN, *Circuit Judges.*

Appeals from order dated April 18, 1966, and from order of September 12, 1966, denying a motion indefinitely to stay the trial, DISMISSED on the ground of non-appealability.

Motion for leave to file a petition for a writ of mandamus DENIED.

Motion to consolidate appeals DENIED.

LPM
HJF
IRK

U.S.C. JJ.

October 25, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 873

JOSEPH COLOZZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum order of the court of appeals (Pet. Appendix) is not reported.

JURISDICTION

The order of the court of appeals was entered on October 25, 1966. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to December 23, 1966, and on December 16, 1966, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, an interlocutory order denying an indefinite stay of trial was reviewable in a court of appeals.

STATEMENT

On February 2, 1962, the government filed an information in the United States District Court for the Eastern District of New York charging petitioner, in three counts, with filing false statements in labor union reports in violation of 29 U.S.C. 431(a) and 439(b). From time to time the case was continued because of petitioner's alleged illness and inability to stand trial. On February 17, 18 and 23, 1966, upon motion of the government, a pre-trial hearing was held to determine the exact nature and extent of petitioner's disability.

At this hearing, several medical reports relating to peitioner's illness, two of which had been prepared by a government and court-appointed physician, respectively, indicated that petitioner was a Class IV cardiac patient with a 90 percent disability, and that, in his present condition, it would be dangerous for him to stand trial.[1] On the other hand, non-medical evidence tended to show that petitioner was seemingly less disabled than the condition reflected in these reports. It was shown that during the time he was allegedly 90 percent disabled, he held eleven different positions with the International Longshoreman's Association (R. 6–7).[2] For these services, which required

[1] The medical reports are not included in the record on appeal filed with the Clerk of this Court. These reports are summarized, however, in the memorandum of the district court at pages 443–445, 445–447, 448–450, and 451–452 of the record on appeal.

[2] Petitioner was president of Local 1277 of the International Longshoreman's Association (ILA); member of the executive board of Local 1277; delegate to the district council from Local

continual contact with union members and periodic meetings (R. 71–72), petitioner received approximately $22,500 (R. 12). During November and December of 1963, petitioner, in his capacity as a principal labor negotiator, attended five collective bargaining sessions (R. 24), and he attended twelve more similar sessions during the year 1964 (R. 27–29). It was also shown that during the three years immediately preceding the hearing, petitioner had attended approximately sixty different business meetings in the New York City area (R. 37), and numerous social functions (*e.g.*, R. 77–84). He travelled to Baltimore for an executive committee meeting (R. 34), and flew to Miami Beach for an ILA national convention (R. 34). Despite his illness, petitioner continued to drive his own automobile (R. 111–112, 310).

Upon conclusion of the hearing, at which petitioner himself was interrogated for approximately fifteen minutes by the court in chambers, Judge Rosling, to whom this matter had been referred, expressed extreme difficulty in reconciling the medical testimony with petitioner's numerous activities. Nevertheless, on April 18, 1966, the court granted a continuance until the fall calendar. Recognizing the difficulty imposed upon the government in proving the negative

---

1277; delegate at large to the national convention of the ILA; vice-president of the Atlantic Coast District of ILA; organizer employed by the ILA; Union Trustee of the Metro ILA Welfare Fund; Union Trustee of the Metro ILA Pension Fund; Union Trustee of the New York Shipping Association ILA Medical and Clinical Services Fund; Union Trustee of the New York Shipping Association ILA Containerization Fund; and Union Member of the New York Shipping Association ILA Medical Center of New York (R. 7–8).

of petitioner's assertion that he was unable to stand trial, and taking into account the fact that petitioner had the burden of proving his inability to stand trial, the court conditioned that continuance upon the requirement that petitioner file with the United States Attorney, on a monthly basis, a "diary" summarizing his daily activities (R. 440–478, 479–480). A notice of appeal from that order was filed by petitioner on April 28, 1966. Petitioner thereafter refused to file the monthly reports (R. 305). On June 2, 1966, Judge Rosling granted the government's motion for a trial date, subject, however, to final consideration by the trial court (R. 407, 499).

On September 12, 1966, petitioner moved for an order indefinitely staying the trial on the ground of petitioner's continuing illness. That motion was denied by Judge Rosling, and a notice of appeal was filed. On September 26, 1966, the government moved the court of appeals to dismiss the appeals from the April 18 and September 12 orders for lack of appellate jurisdiction. In opposition, petitioner orally moved for leave to file a petition for a writ of mandamus, directing the district court indefinitely to stay the trial of the case. On October 25, 1966, the court of appeals dismissed both appeals on grounds of non-appealability (28 U.S.C. 1291), denied a motion to consolidate, and denied leave to file a petition for a writ of mandamus (Pet. Appendix).

ARGUMENT

1. A reading of Judge Rosling's thorough and meticulously detailed memorandum (R. 440–478),

summarizing all medical and non-medical evidence introduced in the pre-trial hearing, reflects his sympathetic concern with the condition of petitioner's health and the problem that it presents here. Only after thorough deliberation did that court order a conditional continuance until fall 1966. As noted in the accompanying memorandum, the medical testimony (which to some extent had to rely on petitioner's description of his symptoms) was counterbalanced by several factors, including petitioner's numerous physical activities during the period of his alleged disability, his endurance of the three days of the pre-trial hearing without any noticeable difficulty (R. 455–456), and the relatively short and uncomplicated trial which would be required to try the allegations of the information (R. 462–463). As Judge Rosling indicated, all these circumstances induced him to question the infallibility of the medical opinions "when stubborn fact registers dissent" (R. 458).

Under the circumstances presented here, there is no reason to depart from the well established rule, embodied in 28 U.S.C. 1291, prohibiting appeals from interlocutory orders, including orders denying an indefinite stay of trial on account of the alleged illness of the defendant. See *Scholl* v. *Felmont Oil Corporation,* 327 F. 2d 697, 699–700 (C.A. 6); *Bedgisoff* v. *Cushman,* 12 F. 2d 667, 667–668 (C.A. 9). *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541, 546, and *Stack* v. *Boyle,* 342 U.S. 1, 6, cited by petitioner, are inapposite to the facts of this case, since both those cases concerned appeals from collateral orders which finally determined rights which were independent of the trial

itself. Whether or not to grant a continuance is committed to the sound discretion of the trial court, *Isaacs* v. *United States,* 159 U.S. 487, 489; *Goldsby* v. *United States,* 160 U.S. 70, 72, and it would unduly delay criminal proceedings in violation of the "final judgment" policy of the Judicial Code if defendants could obtain review in a court of appeals whenever a request for a delay of trial were denied.

2. For the reasons set forth above, the court below also properly denied petitioner leave to file a petition for a writ of mandamus to direct the trial court to stay the trial indefinitely. It is well settled that mandamus should not issue to control a district court's exercise of discretion. *In re Blake,* 175 U.S. 114, 117; *In re Rice,* 155 U.S. 396; *In re Parsons,* 150 U.S. 150. Petitioner attempts to circumvent this rule by alleging that the district court's discretion was abused in this case. It should be noted that, however, that contrary to petitioner's suggestion (Pet. 6–7), the lower court's denial of an indefinite stay did not compel petitioner to stand trial immediately. When the government moves to set a trial date, petitioner is not foreclosed from demonstrating (if he is able to do so) that his physical condition would prevent him from standing trial. The order merely deprives him of the shelter of an indefinite stay of trial, under which he would not have to make any showing of a continuing disability. Moreover, the trial judge was fully justified in providing, as a condition of petitioner's requested continuance, that petitioner furnish a record of his activities so that court and the government could be apprised of any changes in his condition

which would bear on his ability to stand trial. Petitioner, who refused to comply with this reasonable request, is hardly in a position to argue that, regardless of his activities, he is entitled to an indefinite stay of trial.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

FEBRUARY 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967